Leading Edge Aviation Services, Inc. *and* Terry Host.
Case 11–CA–19783

September 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 22, 2003, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified.[1]

We agree with the judge's finding that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by failing and refusing to hire Charging Party Terry Host as a Quality Control Inspector (QC inspector) on its second shift. For the reasons discussed below, however, we find that the Respondent lawfully refused to hire Host for that position on its first shift.

Facts

The pertinent facts are fully set forth in the judge's decision. In brief, the Respondent operates an aircraft maintenance facility in Greenville, South Carolina, as a subcontractor to the Lockheed Martin Aircraft Center. The Respondent's director of military programs, Craig Arnold, is responsible for this facility. The Respondent's facility is located within the fenced-in Lockheed property; its employees work in the same aircraft hangars with Lockheed employees and its managers have daily contact and regular meetings with Lockheed's managers.

In early October 2002,[2] the Respondent determined that it needed to hire two new QC inspectors. One would replace its only QC inspector, Harry Gaskins, who was slated to become a manager. The other one would be the QC inspector for the new second shift that was targeted to begin the first of January 2003 due to an expected increase in work.

Terry Host applied for a QC inspector position on October 31. Host was a highly qualified applicant, with many years of aircraft maintenance experience, including 6 years as a QC inspector with Lockheed. While at Lockheed, Host was a prominent and visible leader of an unsuccessful union organizing campaign in 1999; he was also the target of several unfair labor practices committed by Lockheed, filed a charge against Lockheed, and testified at the hearing.[3] In an interview with Arnold on October 31, Host stated he had no problems working on the second shift or being paid $18 per hour.

The Respondent never offered Host a job. Instead, it offered the second shift QC inspector position to Jeff Meyer on November 5 or 6. However, Meyer rejected the offer, and the Respondent ultimately never hired anyone for that position. Carlos Hoyos, who was referred by Meyer, was hired as the first shift QC inspector on November 18.

Analysis

We first address the Respondent's hiring decision with respect to Host and the second shift, and then examine the decision with respect to the first shift, applying in both instances the test for refusal-to-hire violations articulated in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

I.

With respect to the Respondent's decision not to hire Host for its second shift, we agree with the judge's finding that the General Counsel has carried his initial burden under *FES*. We further agree that the Respondent has failed to prove that it would not have hired Host even absent his union activities.

The General Counsel demonstrated that the Respondent was hiring or had concrete plans to hire at the time Host applied and that Host's technical skills and experience were relevant to the announced or generally known requirements for the QC inspector position.[4] On the basis of the credited testimony, the judge found that Arnold was aware, at least as of November 4 or 5, of Host's union activities at Lockheed and his Board charges against Lockheed.[5]

Although there was no direct evidence of animus, the judge properly found that the record as a whole, and in

[1] We have modified the judge's recommended Order to delete the requirement that the Respondent make discriminatee Terry Host whole within 14 days. We have also added a make-whole provision to the judge's recommended notice.

[2] All dates are 2002, unless otherwise indicated.

[3] *Lockheed Martin Aircraft Center*, Case 11–CA–18558 (Dec. 11, 2000) (ALJ) (unpublished).

[4] Indeed, Arnold admitted that Host was a "good strong candidate with well-rounded experience and strong technical skills."

[5] In affirming that finding, we do not rely on the judge's inference that Lockheed Supervisor Janus must have informed Arnold about Host's actions. Rather, we rely on Host's uncontroverted testimony that, on November 4 or 5, he told Arnold about his union activity and his "court case" against Lockheed. We also note that Arnold admitted that he was aware of Host's union activities by the time that Arnold hired Hoyos on November 18.

particular the Respondent's pretextual reasons for not hiring Host, support an inference of animus. See *Tidewater Construction Corp.*, 341 NLRB No. 55 (2004); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). Thus, the Respondent contends that it did not hire Host for the second shift because the work that was to be done on that shift never materialized. Yet Arnold admitted that the Respondent did start the second shift in early November by hiring two new employees and transferring others from the first shift. Further, according to credited testimony, Arnold offered the second shift QC inspector position to Meyer on November 5 or 6.[6] Arnold also claimed that one reason for rejecting Host was that his "written skills were lacking," even though he had no objective basis for this conclusion. Finally, Arnold added written comments on Host's application some 2 weeks after his interview, which the judge found to be "disingenuous and contrived."[7]

Because the Respondent's reasons for not hiring Host for the second shift QC inspector position have been found to be pretextual—i.e., they either did not exist or were not actually relied on—they cannot form the basis for a valid rebuttal to the General Counsel's case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). We therefore adopt the judge's finding that the Respondent violated Section 8(a)(1), (3), and (4) by failing and refusing to hire Host as its second shift QC inspector.

II.

In contrast to our ruling with respect to the second shift decision, we find merit in the Respondent's exception to the judge's finding that it unlawfully failed to hire Host for the first shift QC inspector's position. We assume arguendo that the General Counsel established an initial showing of discriminatory motive. However, the Respondent has met its burden of demonstrating that it would not have hired Host for that position even absent his union and protected activities.

Host appeared at his job interview on October 31 wearing sunglasses, jeans, and boots. Based on the interview, Arnold concluded that Host was lacking in interpersonal skills. The conclusion as to lack of interpersonal skills was, in turn, based primarily on two factors: (1) Host was "overconfident" in the interview; (2) Host wore sunglasses during the interview and thus could not make eye contact with Arnold or vice versa. Arnold thus found that Host would be better suited for the second shift QC inspector position, where there would be less need for him to "interface" with Lockheed management, and that he was not suitable for the first shift position, which required greater interaction with Lockheed management. Arnold explained:

> Probably the most sensitive part of that job is—related to the customer/subcontractor relationship. The customer/subcontractor relationship, the customer is always right, but in some cases they're not. And the communication skills are important in being able to tell the customer he is wrong. It requires sometimes a lot of self-composure. It certainly requires the ability to be able to communicate . . . carefully.

Arnold's assessment that Host was not suited for the first shift position was evident in the interview and in his telephone call to Host the following day. Host himself testified that the second shift was the *only* shift Arnold discussed with him in the interview. In the follow-up telephone call, Arnold told Host that he was qualified for the second shift QC inspector position. No mention was made of the first shift position. Thus, it is apparent that, based on the interview, Arnold ruled out Host as a candidate for the first shift position. We find that the Respondent established a valid, nondiscriminatory reason for not hiring Host for the first shift position, based on its reasonable conclusion that Host's poor interpersonal skills rendered him unsuitable for that position, where such skills were important.

In finding that the Respondent failed to show that it would have refused to hire Host in the absence of his union activity, the judge's reasoning regarding Host's wearing of sunglasses during his interview misses the mark. Thus, the judge discounted Host's wearing of sunglasses as a reason for the Respondent's not hiring him merely because she viewed this reason as inconsistent with Arnold's statement that he "would have considered Host for the second shift position if the work had come through." In finding this supposed inconsistency, the judge ignored the difference between the first shift and second shift positions pointed out by the Respondent. Thus, the judge failed to address the first shift job's additional requirement of frequent interaction with Lockheed management and the need for such interactions to be handled with a deft touch. Given this significant difference between the first shift and second shift positions, there is nothing inconsistent between Arnold's finding Host unqualified for the first shift position due to his

[6] The fact that the Respondent did not continue the second shift in January 2003, does not explain why Host was not hired in early November.

[7] According to the credited testimony, Arnold was also untruthful in his dealing with Host. He told Host, falsely, that two men from Texas and California were being brought in to fill the QC inspector positions. Arnold also told Host that he had checked with Host's references, when in fact he had not done so.

poor interpersonal skills and Arnold's stated willingness to hire Host for the second shift position.

Moreover, in light of the judge's failure to address the Respondent's explanation that the difference between the first shift and second shift positions accounted for Arnold's finding Host suited for the latter but not the former, we cannot accept the judge discrediting Host's wearing of sunglasses in his job interview, and the negative impression of overconfidence, as the reasons for the Respondent's not hiring Host for the first shift position. Thus, we disagree with the judge's finding that the Respondent's supposed inconsistency in rationale was "more illustrative of a pretext than a valid consideration."

In giving credence to Arnold's reasons for finding Host not suited for the first shift position, we do not rely on Arnold's testimony alone. We rely, in part, on the undisputed fact that Host wore sunglasses during his job interview with Arnold and on reasonable inferences that may be drawn from this fact. Additionally, Arnold's testimony that the poor impression Host made at the interview regarding his interpersonal skills led Arnold to rule him out for the first shift position is further supported by *Host's* testimony that the *second shift* QC job was the only position that Arnold discussed with him at the interview. Consequently, we find credible Arnold's explanation that, based on the interview, he concluded that Host lacked interpersonal skills and was overconfident. We further find that Host's wearing of sunglasses in the interview, gave a negative impression to Arnold.

As noted, the judge discredited Arnold's testimony that Host's wearing of sunglasses during the interview led Arnold to find Host unsuitable for the first shift position. We disagree with that discrediting because it was narrow and based on a false premise. As explained above, the judge rejected, as inconsistent, Arnold's testimony that Host's wearing of sunglasses and the negative impression he gave during the interview led Arnold to conclude that he was unsuitable for the first shift position but not the second shift position. As explained above, we have found this discrediting flawed, because the judge failed to acknowledge or address the Respondent's explanation regarding the difference between the first shift position and the second shift position.

In addition, we rely on other testimony of Arnold which was uncontradicted.[8]

Concededly, the wearing of sunglasses and the projection of overconfidence may be questioned by some as a basis for denying a job to an applicant. But, job interviews are largely subjective matters, and it is not for the Board to second-guess employers on these matters. Arnold's assessment that Host was unsuitable for the first shift is to be respected.

Accordingly, we find that the Respondent has shown that it would not have hired Host for that position even in the absence of his union and protected activities.[9] We reverse the judge and find that the Respondent's failure to hire Host for the first shift QC inspector position did not violate the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Leading Edge Aviation Services, Greenville, South Carolina, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"Make whole Terry Host for any losses he may have suffered by reason of the discrimination against him as set forth in the remedy section of this decision."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 29, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

The majority relies entirely on discredited testimony[1] to find that the Respondent lawfully refused to hire Terry Host as the QC inspector on its first shift. Without that reliance—obviously inappropriate—there is no basis to reverse the judge's finding of a violation. And even if the evidence were credible, it would not establish that the Respondent would have refused to hire Host on the first

[8] The judge did not address Arnold's testimony, quoted above, that the most sensitive part of the first shift QC inspector job related to the customer/subcontractor relationship and required a lot of composure and the ability to communicate carefully. This testimony was uncontroverted, and it has not been disputed by any party.

[9] Contrary to the dissent, in so finding, we are not altering the rebuttal burden borne by employers under *FES*. More specifically, we do not believe that an employer can carry its rebuttal burden by simply "articulating as many seemingly plausible reasons that it can think of." Obviously, an employer must establish that, in fact, there were legitimate reasons for its action. We believe that the Respondent has done so here. Our colleague disagrees. It is this difference, rather than a difference in standards of burden of proof, which separates us from our colleague.

[1] I do not understand why the majority contends that it is not doing so, especially because it specifically criticizes the judge for discrediting the witness on whose testimony it relies.

shift even absent his protected activity. See *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

I.

The majority relies on the testimony of Craig Arnold, the Respondent's director of military programs. Arnold testified that he hired Carlos Hoyos, instead of Host, for the first shift position for several reasons. Arnold testified that Hoyos demonstrated strong communications and interpersonal relationship skills during the interview. Arnold was also "impressed with Hoyos as open-minded and receptive to change." This impression evidently stemmed from the fact that, unlike Host, Hoyos had no experience as a QC inspector and thus would not be wedded to old ways of doing things. Arnold also testified that Hoyos had a better professional demeanor and presentation than Host, who struck Arnold as "overconfident and lacking in interpersonal skills." This latter assessment was apparently based on Host's having worn sunglasses to his interview with Arnold (because he had inadvertently left his regular glasses in his car). Finally, Arnold testified that, although Host demonstrated good verbal communications skills, Arnold was concerned that Host's written communications skills were lacking.

The judge rejected these contentions as "fabricated and without substance." She found unpersuasive Arnold's assertion that Hoyos was more open-minded and receptive to change. She questioned Arnold's expressed concern over Host's written communications skills, in light of Arnold's admission that he had no writing sample or information from Host's previous employer, Lockheed, on which to base that concern. The judge found Arnold's reliance on Host's having worn sunglasses to his job interview invalid, given that Arnold testified that he would have considered Host for the second shift QCI position if enough work had materialized. And she found Arnold's testimony even less credible because of his handwritten notes on Host's employment application, which she found to be "disingenuous and contrived." In short, the judge found the Respondent's proffered reasons for rejecting Host to be pretextual—i.e., they either did not exist or were not actually relied on in making the decision. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Having found Arnold's proffered reasons to be pretextual, the judge necessarily must have discredited the testimony supporting them.

The judge also discredited other critical parts of Arnold's testimony. Specifically, she rejected his claims that he had no knowledge of Host's previous Board charges until the week of the hearing; that he never offered the second shift QCI position to anyone; that he considered Host only for the second shift; and that the only reason he failed to hire Host for that position was the expected work from Lockheed never materialized. Indeed, it is not too much to say that the judge discredited Arnold's testimony, either explicitly or implicitly, in every material respect. The judge was, therefore, on good ground in rejecting the Respondent's proffered reasons for not hiring Host on either the first or second shift, and in finding that it violated Section 8(a)(3) and (4) in each instance.

II.

The majority apparently accepts the judge's findings and conclusions, except in one respect. The one exception is Arnold's claim, based on Host's wearing sunglasses at the interview, that he considered Host to be overconfident and lacking in interpersonal skills. The judge rejected that contention because Arnold professed willingness to hire Host for the second shift; she found that "dichotomy in rationale . . . more illustrative of a pretext than a valid consideration."

The majority argues, as Arnold did, that unlike the second shift QCI, the first shift QCI is often required to deal directly with the client, and therefore that stronger interpersonal skills are required of the inspector on the first shift. Thus, the majority contends, there was no inconsistency between Arnold's refusal to hire Host for the first shift and his stated willingness to hire him for the second shift, and the judge improperly found Arnold's reason for the former action to be pretextual. Accordingly, the majority finds that the Respondent has demonstrated that, even if it was motivated in part by animus toward Host's protected activities, it would have refused to hire Host for the first shift QCI position even absent those activities.

III.

The majority's position is untenable. To reverse the judge and dismiss the allegation that the Respondent unlawfully refused to hire Host for the first shift, the majority must do two things: (1) find that Arnold's professed reasons for not hiring Host—his asserted overconfidence and lack of interpersonal skills—existed and were actually relied on in making the hiring decision (otherwise, the judge's finding of pretext must stand); and (2) find that Arnold would have rejected Host for those reasons, even absent his protected activity. Neither finding can be supported.

First, the majority does not explain why it is willing to accept Arnold's assertions that Host seemed overconfident and lacking in interpersonal skills and that Arnold rejected Host for the first shift position for those reasons. The record contains only Arnold's unsupported testi-

mony in this regard.[2] Were Arnold a credible witness, his testimony might be persuasive. But Arnold was not a credible witness: the majority seemingly agrees with the judge that practically everything else of substance that Arnold said at the hearing was unworthy of belief. Why, then, does it choose to credit Arnold's testimony on this issue?[3] Of course, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness's testimony.[4] But one must provide a sound reason for believing one part of a witness's testimony if all the witness's other testimony is being rejected. The majority has not done so.[5]

In my view, Arnold's unsupported and uncorroborated testimony cannot be accepted, given his lack of credibility when testifying on other matters. Arnold never explained why he deemed Host to be deficient in interpersonal skills apart from his eye wear at the interview. And, despite having interviewed Host personally and having checked with Lockheed personnel concerning Host's previous employment, Arnold failed to point to any evidence that might support a belief that Host was *in fact* deficient in interpersonal skills.[6]

Nor did Arnold establish any link between Host's asserted overconfidence (which Arnold conceded was not necessarily a negative quality) and any job requirement for the *first shift* QCI position. Arnold did suggest that it takes time for overconfident individuals to learn that they are inspecting according to Leading Edge procedures rather than Lockheed procedures. However, Arnold never explained why this should be so for overconfident individuals, but not for others. More to the point, though, is that QC inspectors on both the first and second shifts would be inspecting according to Leading Edge procedures. But Arnold professed a willingness to hire Host for the *second* shift, thereby ruling out any possibility that overconfidence could be a problem on that shift. Absent any distinction between the shifts in this regard, overconfidence could not have worked against Host's application for the first shift position either.

Thus, the judge properly discredited Arnold's testimony that he rejected Host for the first shift position because of overconfidence and lack of interpersonal skills. But even if those qualities existed and contributed to the Respondent's decision, the decision was still unlawful.

The General Counsel has demonstrated that unlawful animus was a motivating factor in the Respondent's refusal to hire Host. Accordingly, the violation is established unless the Respondent can show that it would have refused to hire him even absent his protected activity. *FES*, supra. It is well established that the Respondent cannot carry that burden merely by showing that it *could* have rejected Host because of his asserted overconfidence and lack of interpersonal skills; it must show that it *would* have rejected him for those reasons. See, e.g., *Masiongale Electrical-Mechanical*, 337 NLRB 42, 43 (2001), enfd. in relevant part 323 F.3d 546 (7th Cir. 2003).

The Respondent's problem is that Arnold claimed to have rejected Host not only because of his overconfidence and lack of interpersonal skills, but, *in addition to those reasons*, because of concern over Host's written communications skills and because Hoyos was more open-minded and receptive to change. The judge, the majority, and I have rejected the latter two explanations as pretextual. Thus, having asserted that it turned down Host's application for four separate reasons, the Respondent is now left with only two possibly legitimate reasons for its decision. Of course, the Respondent could have attempted to show that it would have refused to hire Host for those reasons alone, but it did not. Arnold, who made the decision, did not testify that he would have refused to hire Host for the first shift purely because of his overconfidence and lack of interpersonal skills. Accordingly, the Respondent has failed to demonstrate that it would have rejected Host for the first shift position for nondiscriminatory reasons. The majority's contrary conclusion is simply wrong.

IV.

I assume that the subjective factors on which Arnold purportedly relied *could be* valid business considerations in the hiring context. Here, however, they were not: the judge found, and I agree, that they were pretextual—i.e., they either did not exist or were not actually relied on. In finding to the contrary, the majority suggests that an employer can carry its rebuttal burden under *FES* simply by articulating as many seemingly plausible reasons as it can think of for refusing to hire a union supporter, in the hope that the Board will find that at least one has not

[2] Thus, for example, there is no job description in the record indicating that strong interpersonal skills are necessary for the QCI position on the first shift but not the second.

[3] The majority accepts the judge's conclusion that Arnold apparently attempted to create a paper trail to justify not hiring Host—an attempt that would have made no sense had Arnold had a valid reason for rejecting him.

[4] *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds 340 U.S. 474 (1951).

[5] In failing to explain its actions, the majority ignores the Board's long-established policy, which is not to overrule an administrative law judge's credibility resolutions unless the Board is convinced by the clear preponderance of all the relevant evidence that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

[6] Although Arnold also testified that using good judgment and communicating with the proper individual are essential in dealing with customers, he did not testify that he believed that Host would fall short in either respect.

been *disproved* and for that reason alone is not only believable but actually dispositive of the case. Accordingly, I would affirm the judge's finding that that refusal was unlawful.

Dated, Washington, D.C. September 29, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire applicants on the basis of their activities on behalf of the Aircraft Mechanics Fraternal Association or any other union.

WE WILL NOT refuse to hire applicants on the basis of their having filed charges and/or participated in Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Terry Host employment in the position for which he applied or, if that position no longer exists, in a substantially equivalent position, without prejudice to seniority or any other rights or privileges to which he would have been entitled if we had not discriminated against him.

WE WILL make Terry Host whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to employ Terry Host and, WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use this personnel action against him in any way.

LEADING EDGE AVIATION SERVICES, INC.

Jasper Brown, Esq., for the General Counsel.
Melvin Hutson, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Greenville, South Carolina, on April 24 and 25, 2003. The charge was filed by Terry Host, an individual (Host) on December 12, 2002,[1] and later amended on March 7, 2003. Based upon the original and the amended charge, the Regional Director for Region 11 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on March 11, 2003. The complaint alleges that Leading Edge Aviation Services, Inc. (the Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act) by refusing to hire Host on or about October 31, 2002, because of his concerted activity on behalf of the Aircraft Mechanics Fraternal Association (the Union) and because he filed charges and/or participated in a Board proceeding.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the oral arguments given by counsel for the General Counsel and counsel for the Respondent at the close of the hearing, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, is engaged in aircraft maintenance at its facility in Greenville, South Carolina, where it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of South Carolina. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In its answer filed April 2, 2003, Respondent denies that the Union is a labor organization within the meaning of Section 2(5) of the Act and the record contains little evidence with respect to the Union's specific functioning and activities. Host testified without contradiction however, that the Union is a craft-oriented independent aviation union that represents employees of Northwest Airlines, Atlantic Coast Airlines, Alaska Airlines, and American Transportation Air. In 1999, the Union petitioned the Board to represent mechanics employed by Lockheed Martin Aircraft Center (Lockheed) and Host served as president of the Union's organizing committee. Thus, the record contains uncontroverted evidence that the Union is an organization in which employees participate and an organization that exists for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other conditions of employment. Accordingly, I find that the Union

[1] All dates are in 2002 unless otherwise indicated.

is a labor organization within the meaning of Section 2(5) of the Act. See *Alto Plastics Mfg. Corp*., 136 NLRB 850, 851 (1962).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

General Counsel argues that Respondent refused to hire Host on October 31 as a Quality Control (QC) inspector because of his prior union activity at Lockheed as well as for his having filed a charge against Lockheed and for his testifying against Lockheed during the Board proceeding. Respondent argues that Host's protected activities played no part in its decision not to hire him for the position of QC inspector.

B. Respondent's Operation

Respondent has been in operation in Greenville, South Carolina, since August 1989. Respondent's operation involves two primary groups of services for aircraft. One service involves paint stripping and sterilizing the outside of aircraft in preparation for repainting as well as inside and outside aircraft detailing. The second group of services involves repairing and servicing the aircraft's fuel system. The fuel system services operation is performed on a four-engine turbo prop aircraft known as a P-3. During its 14-year operation in Greenville, Respondent has been a subcontractor to Lockheed Martin Aircraft Center (Lockheed) and its operation is contained within the fenced Lockheed property. Although Respondent maintains a separate office trailer, Respondent's employees work in the same aircraft hangars with Lockheed employees. As Respondent's director of military programs, Craig Arnold is responsible for the day-to-day management of Respondent's subcontract facility at Lockheed in Greenville. Arnold confirmed that Respondent and Lockheed utilize common work areas and he interfaces daily with Lockheed's management staff. There are both regularly held meetings and ad hoc discussions between Respondent's managers and Lockheed's managers.

C. Background

Terry Host began working for Lockheed in 1989. His employment as a QC aircraft inspector continued until March 2001, when he resigned to work for General Electric. In 1998 and 1999, Host became actively involved in organizing activities by the Aircraft Mechanics Fraternal Association at Lockheed's Greenville, South Carolina facility. Host testified that as president of the Union's organizing committee, he was in charge of all union activities at Lockheed's facility. He routinely distributed a union newsletter to maintenance employees at least once or twice each week during the organizing period. He also wore a union T-shirt at all times during the Union's organizing campaign.

On December 11, 2000, Administrative Law Judge William N. Cates issued a Bench decision in Lockheed Martin Aircraft Center and Terry J. Host, an Individual[2] finding that Lockheed violated Section 8(a)(1) and (3) of the Act by issuing a verbal warning and written warning to Host because he joined, supported, or assisted the Union and by engaging in protected concerted activity. In commenting upon Host's union activity, Judge Cates stated:

> With respect to Union activity, employee Host testified that he contacted the union and asked about their assisting him in bringing about unionizing of the employees at the Company herein. The evidence tends to indicate that Mr. Host served as the focal or lead point for the Union's activities at the Company, particularly in the 1999 Union campaign that culminated in an election that I believe the record reflects was perhaps held in June of 1999. That election went in favor of the Company by approximately a 2 to 1 vote. During the Union campaign and at all times thereafter, employee Host wrote dear fellow employee letters and distributed those to employees at the Company as frequently as two or more times per week.

Judge Cates also noted that in May and July of 1999, a number of local newspaper articles mentioned Host by name, included his picture, and referenced him as a supporter of the Union. Judge Cates further noted that Host solicited employees to sign union cards and wore union T-shirts bearing the union insignia and he noted that Lockheed's management officials knew about Host's participation in union activities.

D. Respondent's Hiring of QC Inspectors

Prior to October 2002, Respondent employed Harry Gaskin as its only QC inspector. Arnold testified that in early October, Respondent decided to hire additional QC inspectors. Respondent planned to promote Gaskin and to hire a replacement for him on first shift. Additionally, Respondent planned to hire an additional inspector for the new second shift operation that was scheduled to begin in January to accommodate Lockheed's January aircraft arrivals. Each week Respondent receives a report from Lockheed reflecting when different aircraft are scheduled to arrive at Lockheed for servicing. Based upon Lockheed's forecast, Respondent anticipated that it would need a second-shift operation to accommodate the January aircraft arrival.

Respondent advertised in the local newspaper for employees to fill the positions of fuel systems technicians, structures technicians, QC inspectors, production and fuel systems managers and leads as well as division manager. Arnold testified that he had been looking for possibly three QC candidates. He had a 60-day period from the end of October through the end of December as his timetable for hiring new QC inspectors. He added however, that he had wanted to complete the hiring by the first of December. Arnold explained that Respondent was required to have a second inspector by the end of December to prepare for the production increase predicted by Lockheed.

In early November, Respondent began a limited second shift operation. Two new individuals were hired and other employees were transferred from first shift to maintain continuity. Respondent hired Shane Thornley as its first new QC inspector at the end of October. Thornley only worked for 2 or 3 days before he resigned to take a position as a teaching professional with the Professional Golfers' Association, which had been his lifelong dream. Personnel records reflect that Thornley's last day of work was October 28.

[2] 2000 WL 33665485 (NLRB Div. of Judges).

E. Terry Host's Application for Employment

When Host worked as a QC inspector for Lockheed, he was responsible for finding any discrepancies in the aircraft that required repair. After repairs were made by the mechanics, Host again inspected the aircraft. In order to work as a QC inspector, he was required to submit his qualifications and appear before a review board. Host met all the requirements to perform the QC inspection for Lockheed and as Lockheed's QC inspector for 6 years; he received numerous awards for getting out the aircraft in a timely fashion. He also trained other inspectors while he was employed with Lockheed.

After learning from friends about possible job openings at Respondent's facility, Host telephoned Arnold on October 31. Arnold told Host that Respondent was looking for fuel tank inspectors for the P-3 aircraft and Host immediately faxed his resume to Arnold. Host's resume reflected that from 1989 until 2001, he had worked for Lockheed as a QC inspector, performing inspection duties on line and hangar aircraft and back shop components, as well as inspecting aircraft technicians' work prior to releasing aircraft back to service. The resume also reflected that from 1987 until 1989, Host worked for Lockheed Arabia in Saudi Arabia. Host included in the resume that in this capacity he assigned duties of 23 mechanics, launched, recovered, and scheduled maintenance for 16 aircraft; interfaced with Saudi customers, and trained Saudi Arabian Air Force counterparts. Host served as an aircraft mechanic for the United States Air Force from 1980 until 1986 and he was licensed as an AP mechanic.[3] Arnold testified that an AP license is required for Respondent's inspectors and is issued after specific training that follows Federal Aviation Administration (FAA) guidelines. Arnold explained that the training is obtained through a continuous 2-year training program at a dedicated school or 4 years of hands-on experience with subsequent qualifications and testing by FAA designated examiners. After receiving Host's fax, Arnold called and asked Host how soon he could come in to file an application.

Host met with Arnold later in the day on October 31. Host wore a long sleeve dress shirt, jeans, and boots. He also wore his prescription sunglasses into the interview because he had inadvertently left his regular glasses in his car. During the interview, Arnold asked about his prior qualifications and his experience in working on the P-3 aircraft. Host recalled that he told Arnold that he would not only be comfortable with the required paperwork but he would be comfortable with training other employees if needed. Host told Arnold that he would not have any problem working on second shift and that he would be content starting at $18 an hour. Arnold told him that Gaskin would contact him and he would be required to take a drug test. Arnold asked him how soon he could start to work. Host testified that he understood that the only thing standing in the way of his starting was his talking with Gaskin and his taking the drug test.

After talking with Arnold, Arnold's administrative assistant, Bud Kirley, gave Host a tour of the facility. As Host and Kirley walked through the 1029 Hangar, Host saw several of the Lockheed employees with whom he had worked over the years. He recalled specifically seeing and making eye contact with Rich Parker, Lockheed's P-3 program manager. As he continued the tour, Kirley remarked that Respondent planned to bring in two individuals from out of town to do the fuel tank maintenance work. Kirley concluded by telling Host that Gaskin would let him know when he would take the drug test.

On November 1, the next day after Host's tour of the facility, Arnold telephoned Host. Arnold told him that he was going to bring in two men from Texas and California to fill the QC positions. He added that if they did not work out, Host would be his third choice. He suggested that Host might want to check back with him after the first of the year. Over the weekend, Host checked with the individuals who were listed as references on his application and learned that Respondent had not contacted them. On or about November 4 or 5, Host telephoned Arnold and asked him to explain again why he was not going to be hired. Arnold told him only that he was filling the positions with individuals from out-of-town. He assured Host that he had checked his references and he added: "they spoke very highly of you." Host recalled that when he told Arnold that he had contacted his references and he knew that they had not been called, there was a long pause. Arnold again suggested that there might possibly be a job for him after the first of the year.

Host asked Arnold if he had spoken with Lockheed's P-3 program manager, Rich Parker. Arnold acknowledged that he had done so but assured Host that his talking with Parker had nothing to do with whether he was being hired or not hired. Arnold explained that Parker had seen Host in the hangar and had asked Arnold questions about him and had asked whether Host was going to be an employee. Host pressed on and urged Arnold to be honest with him as to what Parker had told him. Host recalled telling Arnold: "Let's cut out the B.S. You know you can be honest with me about what was said. I went from being hired-or, excuse me, to all I need to do is taking drug test one day, then I'm the third choice, and, you know, I'd like the truth." Arnold then acknowledged that while Parker had told him that Host was a good worker, he also mentioned that Host had some trouble in his past. Host assured Arnold that he had not left Lockheed without giving 2 weeks' notice and that he had left voluntarily. Host explained that the only trouble that he had in the past had been related to the Union and added that Lockheed had been found guilty on five of the six charges in the "Court" case against him. Host testified that he then confronted Arnold with Kirley's statement that the individuals coming in from out-of-town were scheduled for maintenance and not QC positions. Arnold ended the conversation by telling Host that there was no job available for him and that Arnold could not hire him at all.

F. Jeff Meyer's Application for the QC Position

Just as Host, Jeff Meyer worked for Lockheed as a QC inspector and then later for General Electric. When Meyer heard about a possible job opening at Respondent's facility, he was scheduled for layoff from General Electric for the first week of November. After he faxed his resume to Respondent's office around the first of November, he was contacted to come in for

[3] AP mechanic Jeff Meyer testified that this term refers to an airframe and power plant mechanic. Meyer testified that Lockheed required its QC inspectors to have an AP license.

an interview. Meyer recalled that his interview was after Host applied for the job and before his layoff on November 8.

When Meyer interviewed with Arnold, Arnold told him that Respondent was planning to bring in employees for the second shift in order to keep the work flowing as well as to hire two QC inspectors. Meyer recalled Arnold saying that he needed inspectors and that he needed to hire fairly quickly. Arnold asked about Meyer's background and also asked how soon he would be available to start work. After Meyer's interview, Arnold telephoned him on or about November 6 and told him that he was in a position to offer Meyer the job at $18 an hour. Meyer asked if he could have a day or two to think about the offer. Meyer did not take the job however, declining it for another job offer. When Meyer telephoned Arnold to let him know that he was not taking the job, Arnold asked him if he knew anyone else who might be interested in the job. Meyer suggested that Carlos Hoyos and Randy Herman might be interested. Meyer offered to get in touch with these individuals and let them know of the job openings and he did so after his conversation with Arnold.

G. Respondent's Rationale for not Hiring Host

Arnold described Host as a good strong candidate for the position. He remembered Host as having good, well-rounded experience and strong technical skills. Arnold testified that he had not offered Host the position however, because he had concerns about Host's interpersonal skills. As an example, Arnold explained that Host's wearing sunglasses during the interview prevented his making eye contact with Host. Arnold added that Host also appeared to have an "over-confidence level." When asked if there were any other reasons that he had not offered Host the job, Arnold recalled that he had some concerns about Host's communication skills. He explained that while Host's verbal skills were relatively good, his written skills "possibly seemed lacking." Although he added that he was not sure if the written communication skills were lacking, he referred to no written document upon which he had based this doubt. Arnold further acknowledged that he did not require a writing sample from Host nor did he check with Lockheed's managers about Host's communication skills or writing ability. Arnold explained that he thought that Host would have been better suited for the second shift QC position because it would require less interfacing with Lockheed management. Arnold explained that he would have extended an offer to Host to work on second shift once he was confident of Lockheed's funding for the scheduled aircrafts.

Arnold asserted that while Host was still under consideration, Respondent received indications from Lockheed that there was no funding committed for new P-3 aircraft after the first of January. Arnold testified that as a result of receiving this "indication" from Lockheed, Host was removed from consideration for employment. As an example of this notification, Respondent submitted a copy of Lockheed's April 22, 2003 PDM and SARP Aircraft Schedule, showing the receipt of only three aircraft in 2003. On the schedule, Arnold noted that no incoming Leading Edge Aviation Service or LEAS work was scheduled to be received after January 6 through July 8. Respondent also provided its personnel rosters for October 30, 2002 and April 23, 2003, showing a reduction in fuel and detail employees from 50 to 34 employees.

It is undisputed however, that Respondent hired Carlos Hoyos as a QC inspector on November 18. Hoyos' resume reflects a fax date of November 13, and Hoyos' application is dated November 14. While Arnold maintained that at the time that Carlos Hoyos was hired on November 18, Host was still under consideration for employment, he never identified the specific date when Respondent first learned of the funding problem with Lockheed or when Host ceased to be considered for employment. Arnold maintains that Respondent never hired a second shift QC inspector and that Respondent no longer has a second shift operation for production in the fuel system.

Arnold recalled that he telephoned Host the day after his interview to tell him that his interview had gone well and that he was certainly qualified for the second shift position. Arnold acknowledged that he had two technicians who came in from out-of-state, however neither of them were inspectors. He denied that he ever discussed these individuals with Host or that he had ever told Host that they were hired as QC inspector positions. Arnold denied that he ever told Host that he could not use him at all.

Arnold denied that he ever offered a position to Meyer. He maintained the only position that would have been open for Meyer was one on the second shift and Meyer had explained that he could not take a first-shift position because of shared child-care responsibilities. Arnold testified that while Hoyos' technical skills[4] were equivalent to Host, Hoyos' communication skills were better. Arnold testified that he had been impressed with Hoyos as openminded and receptive to change and "knowing that is key to understanding a whole new QC system. Arnold added that with Hoyos, there was no concern that he would revert back to old habits from any previous quality control system.[5] He described Hoyos as having a better professional demeanor and presentation.

H. Respondent's Knowledge of Host's Union and Protected Activities

Arnold acknowledged that he had not spoken with any of Host's references about his work. He testified that he had tried to contact one of the individuals but did not reach him. He confirmed that he had spoken with Rich Parker the same day that he interviewed Host. He also talked with Lockheed Supervisor Joe Janus either the same day or the day after his interview with Host. Arnold denied that either Janus or Parker told him anything about Host's involvement with the Union while at Lockheed. Arnold testified that he had not known about Host's having filed a charge with the Board or going to court against Lockheed until the week of the April 25 trial. He admitted

[4] Hoyos' application reflects that he has an associate's degree in airframe and power plant technology as well as experience as an airframe and power plant licensed technician. His nonmilitary work experience includes work as an airframe and power plant mechanic and technician for three employers including Lockheed during the period from 1998 to 2000. After 2000, he worked as an assembly line team leader for General Electric.

[5] Hoyos' resume reflects that while he worked as a technician, he had not worked previously as a QC inspector.

however, that within a week or two after interviewing Host, he learned of Host's union organizing. He testified that he had been walking through the shop floor and employees told him about Host's involvement in union organizing. Arnold did not explain how these conversations came about or why employees would have volunteered such information to him at that time. Arnold did not deny that Host told him about his union activity and the court case when they spoke on November 4 or 5.

III. FACTUAL AND LEGAL CONCLUSIONS

The General Counsel alleges that Respondent refused to hire Host because of his union activity and because he filed charges and/or participated in a Board proceeding. In *FES*, 331 NLRB 9 (2000), the Board defined the elements of a refusal-to-hire violation, as follows:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 [ ] (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 [ ] (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

General Counsel has met the requisite burden by showing that Respondent was hiring or had concrete plans to hire, at the time that Host applied and was rejected for employment. Arnold testified that he had two positions open at the time of Host's interview. Arnold further admitted that while he hired Hoyos, Host's technical skills were equivalent to Hoyos. A comparison of Host's and Hoyos' resumes reflect that while Hoyos had 2 to 3 years of nonmilitary experience as an airframe and power plant mechanic and technician, Host claimed 12 years of experience as a QC inspector for Lockheed. Thus, both of the first two elements are established in the refusal to hire analysis.

Respondent argues that General Counsel has not met the burden of establishing the third element in the analysis. Respondent argues that direct evidence of animus is required and the record is devoid of such evidence. Certainly, this case is somewhat unique in the fact that there is no evidence that Host or any other employee engaged in union activity at Respondent's facility. All of the union activity and protected activity in filing and pursuing a Board charge was directed to Lockheed and not Respondent. Additionally, there is neither an allegation nor any evidence that Arnold or any other management official engaged in any independent 8(a)(1) violation. Accordingly, Respondent is correct in its argument that there is no direct evidence of animus toward Host. Citing *Fluor Daniel, Inc*., 304 NLRB 970 (1991), counsel for the General Counsel argues that animus may be inferred however, even without direct evidence. Contrastly, Respondent argues that the circumstances involved in the *Fluor Daniel* case are distinguishable from the facts herein. In *Fluor Daniel*, an employer failed to hire any of 48 known union supporter applicants. Despite the fact that the applicants had sufficient credentials and experience to fill the positions, none of the applicants were offered a position, called for an interview, or even contacted by the employer after submitting their application. Respondent's counsel argues that in the instant case, there was only one individual involved and that Respondent had a legitimate business reason for not offering him a position.

The circumstances of this case are different from *Fluor Daniel* with respect to the number of applicants and the existence of direct evidence of knowledge of Union and protected activity. These differences however, are insufficient to affect the applicability of the Board's findings to the instant case. In discussing the burdens of the General Counsel and the respondent under *Wright Line*, supra, the Board stated in *Fluor Daniel*: "It is also well settled, however, that when a respondent's stated motives for i[t]s actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole." *Fluor Daniel*, above at 970. The Board has also noted that because there is seldom direct evidence of unlawful motivation, the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive may be drawn. See *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987).

I find the record as a whole supports an inference of animus. This conclusion is based upon a number of factors. Respondent acknowledges that at the time that Arnold interviewed Host on October 31, there were two QC positions to be filled. Respondent contends that it would have considered Host for the second shift position had it ever materialized. Respondent asserts that because of the reduction in work from Lockheed, the second shift QC position never came about. Certainly, Respondent presented evidence to show that there was a reduction in work and ultimately a reduction in the work force in 2003. Accordingly, while it may be plausible that there was no second shift QC inspector position available in 2003, Respondent has not credibly demonstrated a nondiscriminatory basis for its failure to hire Host when he applied in October 2002. Arnold testified that he had only considered Host for the second shift QC position. By asserting that Host was only considered for the second shift QC inspector position, Respondent reduces the availability of work for Host. I find Respondent's asserted reasons for such limited consideration as pretextual. Arnold admits that Host was a good strong candidate with well-rounded experience and strong technical skills. Arnold described Hoyos and Host as having equivalent technical skills. Arnold contends however, that he selected Hoyos over Host because Hoyos impressed him as being openminded and receptive to change. He contends that he wouldn't have concerns about Hoyos reverting to any

bad habits from quality control experience. While he gave no further explanation, he apparently found Hoyos preferable because he had never worked as a QC inspector in contrast to Host who had 12 years experience as a QC inspector for Lockheed. Although Arnold described Hoyos as having better communication skills, he acknowledged that Host's verbal communication skills were good. He added that possibly his written skills were lacking. He admitted however, that he neither required Host to provide a writing sample nor did he check with Lockheed's managers to determine Host's writing ability. He in fact, identified no objective basis for his alleged doubts of Host's written communication skills.

It is undisputed that on the same day or the day after Host's interview, Arnold talked with Rich Parker and Joe Janus. Arnold denies that either of them told him about any problems with Host or about his union activity. Arnold admits however, that Parker was surprised to see Host on the premises and questioned his presence. Arnold also acknowledged that he had heard from "some folks" on the floor that when Host left Lockheed there had been "some issues." Arnold testified that when he had spoken with Janus, Janus had simply verified Host's employment and described him as a good inspector. In the November 2000 trial before Administrative Law Judge Cates, Host testified that Janus threatened him with discharge for wearing a union logo T-shirt rather than a company-provided shirt. In his December 11, 2000 decision, Judge Cates not only found that Janus' comments constituted a verbal promulgation of an unlawful uniform policy, but also an unlawful termination threat because of Host's union activity. Additionally, Judge Cates found that Lockheed unlawfully issued a written warning to Host for engaging in protected concerted activity. The text of the decision indicates that Janus testified that Host was out of his work area at the time and Lockheed argued that Host was not engaged in protected concerted activity.

Thus, rather than talking with the references listed in Host's application, Arnold almost immediately talked with Janus about Host's work at Lockheed. I find it incredible that Janus simply verified Host's employment and described Host as a good inspector without mentioning Host's union or protected activities. It is implausible that Janus would have failed to mention that Host filed a charge against Lockheed and testified against the company in the unfair labor practice proceeding. As a result of Host's testimony, Judge Cates found Janus's actions violative of the Act. Although exceptions to the judge's decision may be pending, it would be naive to assume that a Lockheed manager named in the judge's decision would have a casual response to any inquiry about Host.

Although Arnold asserts that neither Parker nor Janus told him about Host's union or protected activity, he admits that he was told about Host's union activity within a week or two of Host's interview. He recalled that while walking through the shop floor, employees told him about Host's involvement in union organizing. Thus, by Arnold's own admission, he was aware of Host's union organizing activities when he hired Carlos Hoyos on November 18. Additionally, Arnold did not refute Host's testimony that he (Host) told Arnold about his union activity and the court case when they spoke on November 4 or 5. Accordingly, the overall evidence supports a finding that when Arnold rejected Host for the position of QC inspector, he knew about Host's union activity and his having filed and pursued Board charges against Lockheed. I also note that Host filed an amended charge on March 7, 2003, alleging that Respondent not only failed to hire him because of his union activity but also because he filed charges and gave testimony under the Act. The complaint and notice of hearing that issued on March 11, 2003, specifically alleges in paragraphs 7, 9, and 12 that Respondent failed to hire Host because of his having filed charges and/or participated in a Board proceeding. As the manager who is responsible for the day-to-day management of Respondent's Greenville, South Carolina facility, I find it incredible that he only learned of Host's having filed charges and his participation in the Board hearing during the week preceding the April 24, 2003 hearing. Accordingly, I find that when Respondent refused to hire Host, it did so with knowledge of his prior union activity and his protected activity in filing and pursuing charges under the Act. Arnold's denial of this knowledge and his denial of any information received from Lockheed managers diminish his credibility.

Further, the overall record reflects that Respondent's reasons for selecting Hoyos rather than Host were pretextual. Jeff Meyer credibly testified that he interviewed and applied for the QC inspector position after Host. Meyer recalled Arnold's telling him that Respondent needed inspectors and needed to hire fairly quickly. Although Arnold recalled that he interviewed Meyer, Respondent contended that his application and resume were lost. Arnold testified that he had not offered a position to Meyer because he knew that Meyer would only be available for a second shift position. I note however, that if Respondent admitted to offering a position to Meyer on second shift or on any shift, such an offer would adversely affect Respondent's rationale for not hiring Host. I found Meyer to be a credible witness. He was not involved in the union organizing campaign at Lockheed and has never worked for Respondent. His testimony appeared straightforward with no inclination to exaggeration or embellishment. I find no basis to discredit Meyer's testimony that Arnold offered him a QC inspector job after he submitted an application and interviewed with Arnold. When Meyer declined the offer, Arnold asked him if he knew anyone else who might be interested. It was Meyer's suggestion and his contacting Carlos Hoyos that led Respondent to Hoyos. Despite the fact that Host was admittedly a good strong candidate with good experience and good technical skills, Arnold offered the position first to Meyer and then ultimately to another individual that Meyer suggested. The only rationale that Arnold could give for not offering the position to Host was his contention that he had "concerns about Host's interpersonal skills" and that Host's written communication skills seemed possibly lacking. This determination was made however, despite the fact that Arnold did not request a writing sample from Host nor verify any possible deficiency with Lockheed or any other previous employer. While Arnold included Host's wearing of sunglasses during the interview as one of the considerations in failing to hire Host, he nevertheless asserted that he would have considered Host for the second shift position if the work had come through from Lockheed. Such a dichotomy in

rationale appears more illustrative of a pretext than a valid consideration.

Additionally, I find Arnold's rationale for not hiring Host less credible based upon Arnold's handwritten notes on Host's application. (GC Exh. 10.) Arnold testified that during the interview, he noted the last day that Host was scheduled to work for GE. Written beneath this date are the words "Okay our second shift" with lines drawn through the words. Arnold identified the next line as "LMAC schedule change" followed by "No." Arnold testified that these words were written at a different time and indicated Lockheed's schedule change and that Respondent could not hire Host and could not fill another position. The final portion of Arnold's handwritten note includes "Carlos Hoyos accepted. Hold for future openings." Arnold gave no plausible explanation for going back to Host's application 2 to 2-1/2 weeks later to confirm that the job had been offered to Hoyos or to add the gratuitous information about his qualifications for second shift and Respondent's inability to hire him for that shift. Overall, the notes appear disingenuous and contrived.

Respondent contends that it only considered Host for the second shift position and would have offered him the job had Respondent received funding from Lockheed to expand the second shift fuel service operation. I do not find Respondent's argument persuasive. Meyer credibly testified that he was offered the second shift QC inspector position on or about November 6. Thus, Meyer's credible testimony completely undercuts Respondent's argument that no position was ever available for Host. Additionally, Arnold admits that the second shift operation began in November. Two new employees were hired and others transferred from the first shift. Arnold admits that as late as November 18, Host was still under consideration for employment. Additionally, Arnold's explanation as to why Hoyos was the better choice for the day shift QC inspector position appeared to be fabricated and without substance. Arnold's assertion that Hoyos appeared more openminded and receptive to change is unpersuasive. Additionally Arnold's explanation of his concerns about Host's writing skills were equally questionable when he admitted that he had no writing sample or information from Lockheed upon which to base this opinion.

Accordingly, even without direct evidence, I find that an inference of animus and a discriminatory motive are warranted under all the circumstances of the case. *Grant Prideco*, 337 NLRB 99 (2001). *Washington Nursing Home, Inc*., 321 NLRB 366, 375 (1996). Thus, even though there is no overt evidence of animus, an inference of animus may be drawn from evidence of false reasons and concealment. Finding Host's and Meyer's testimony to be more credible than Arnold, I find that an inference of animus is justified, noting, inter alia, that the various reasons given by Respondent for its failure to hire Host on either first or second shift are pretextual. I further note that a pretextual reason supports an inference of an unlawful one. *Keller Mfg. Co*., 237 NLRB 712, 717 (1978).

Based upon the record as a whole, I find that the circumstances warrant an inference that Respondent's true motive is an unlawful one. See *Wright Line*, supra, 251 NLRB at 1088 fn. 12 (citing *Shattuck Dean Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Finding Respondent's asserted reason for its failure to hire Host as pretextual, I also find that Respondent has failed to satisfy its *Wright Line* burden of showing that it would not have hired Host, even in the absence of his union activity. See *FES*, 331 NLRB 9, 12 (2000).

Section 8(a)(4) of the Act provides that it shall be an unfair labor practice for an employer to discriminate against an employee because he files charges or gives testimony under the Act. As the Board noted in *General Services*, 229 NLRB 940, 941 (1977), the Board's approach to remedying violations of Section 8(a)(4) has generally been liberal in order that the Board may perform its statutory function. Under this liberal approach, the Board has included within the protections of Section 8(a)(4), job applicants and employees of other employers. Id. at 941. The evidence reflects that General Counsel has established a *prima facie* case that in refusing to hire Host, Respondent was motivated at least in part by unlawful reasons and that Respondent has not met its burden of demonstrating that it would have refused to hire Host absent his filing of charges with the Board and his testimony and participation in the Board proceeding. Accordingly, Respondent has not met its burden under the *Wright Line* analysis and as established for discrimination analysis under Section 8(a)(4) of the Act. *Freightway Corp*., 299 NLRB 531 fn. 4 (1990). Accordingly, the record supports a finding that Respondent failed to hire Terry Host in violation of Section 8(a)(1), (3), and (4) of the Act.

CONCLUSIONS OF LAW

1. Respondent Leading Edge Aviation Services, Inc. of Greenville, South Carolina, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1), (3), and (4) of the Act by its refusal to hire Terry Host.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully failed to hire Terry Host, I shall recommend that Respondent be required to offer him a job and to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from October 31, 2002 to the date of proper job offer, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Leading Edge Aviation Services, Inc., Greenville, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to employ job applicants because of their union activities or because of their having filed charges and/or testified in a Board proceeding.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Terry Host employment in the position for which he sought to apply without prejudice to his seniority or other rights or privileges to which he would have been entitled absent the discrimination against him.

(b) Within 14 days from the date of the Board's Order, make whole Terry Host for any losses he may have suffered by reason of the discrimination against him as set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order remove from its files any reference to the unlawful refusal to employ Terry Host and within 3 days thereafter notify the employee in writing that this has been done and that this personnel action will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Greenville, South Carolina facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 31, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 22, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire applicants on the basis of their activities on behalf of the Aircraft Mechanics Fraternal Association or any other union.

WE WILL NOT refuse to hire applicants on the basis of their having filed charges and/or participated in Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Terry Host employment in the position for which he applied. If that position no longer exists, we will offer employment in a substantially equivalent position, without prejudice to seniority or any other rights or privileges to which he would have been entitled if we had not discriminated against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to employ Terry Host and, WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use this personnel action against him in any way.

LEADING EDGE AVIATION SERVICES, INC.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."